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Torts--Defective Design

Carl N. Frankovitch
West Virginia University College of Law

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Decedent, Robert Pike, was killed when struck by a paydozer manufactured by the Frank G. Hough Company, and a wrongful death action was brought against the defendant manufacturer. Plaintiffs contended that the manufacturer should have been aware that the machine's structural design made it impossible for an operator to see a six-foot man standing in a twenty by forty-eight feet rectangular area in the rear of the machine, and that the manufacturer could easily have reduced the blind spot to a cone-shaped area with a maximum length of twelve feet with the installation of rear view mirrors. Plaintiffs sought to establish the liability of the defendant on either a negligence or a strict liability theory, based on the design of the paydozer. The trial court nonsuited the plaintiffs, holding as a matter of law that the machine was neither defectively nor negligently designed, and therefore the doctrine of strict liability was inapplicable. On appeal, *held,* judgment reversed. A manufacturer must use reasonable care to design his product to make it safe for the use for which it is intended, and additionally, strict liability may be imposed upon a manufacturer for injuries which arise from defective design as well as defects in manufacture. *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

The significance of *Pike* is two-fold. First, the court applied traditional negligence concepts to a manufacturer who negligently designed a product without the court's considering defective or negligent manufacture. Second, the court imposed strict liability on a manufacturer who defectively designed a product and extended the strict liability concept to encompass mere bystanders.

I. The Negligence Issue

The court relied heavily on section 398 of the Restatement (Second) of Torts to impose negligence liability on manufacturers for defective design.[1] The standard previously applied to a manufacturer had been one of reasonable care to design his product so as to make it safe for the use intended, although this design need not

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[1] Restatement (Second) of Torts § 398 (1965) provides:
A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

be accident-proof.[2] The court in *Pike* stated that the likelihood of harm from a machine of a particular design must be weighed against the burden incurred when necessary precautions are taken to avoid the harm.[3]

The problems involved in establishing negligence for defective design are similar to those encountered in establishing negligence in defective manufacture. While negligent manufacture or construction is carlessness in the actual building of a product, negligent or defective design involves improper planning of a product.[4] A number of cases have held that as evidence of proper design, one may establish that a very large number of the products were used without an injury of the kind for which recovery was sought.[5]

In *Menchaca v. Helms Bakeries, Inc.*,[6] a case similar to *Pike*, the court held that a well-constructed product may have been negligently equipped — precisely what the plaintiff contended in *Pike*. In neither *Pike* nor *Menchaca* was there any contention that the machines had been defectively manufactured. The negligence in these cases was predicated on defective design of the products, and the injuries were incurred by bystanders. In permitting recovery under these circumstances the California court extended the manufacturer's duty of care to third persons or bystanders, thereby effectively eliminating any issue of privity and extending the manufacturer's scope of liability to include those who would be expected to come in contact with or be endangered by the qualities of design which were found defective.

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[2] Davlin v. Henry Ford & Son, 20 F.2d 317 (6th Cir. 1927); Dean v. General Motors Corp., 301 F. Supp. 187 (E.D. La. 1969); Varas v. Barco Mfg. Co., 205 Cal. App. 2d 246, 258, 22 Cal. Rptr. 737, 744 (1962); Campo v. Schofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

[3] 2 Cal. 3rd at ___, 467 P.2d at 232, 85 Cal. Rptr. at 632. 2 F. HARPER & F. JAMES, THE LAW OF TORTS §28.4 at 1542 (1956).

[4] Maynard v. Stinson Aircraft Corp., U. S. Av. 71 (Mich Cir. Ct. 1940).

[5] Simmons v. Gibbs Mfg. Co., 170 F. Supp. 818 (N.D. Ohio 1959), *aff'd*, 275 F.2d 291 (6th Cir. 1960). *See also* Amason v. Ford Motor Co., 80 F.2d 265 (5th Cir. 1935) (conformity of design to standard manufacturing practice); Ford Motor Co. v. Wolber, 32 F.2d 18 (7th Cir. 1929), *cert. denied*, 280 U.S. 565 (1929) (non-occurrence of accidents from the use of numerous other products of same type produced by defendant); Reusch v. Ford Motor Co., 196 Wash. 213, 82 P.2d 556 (1938) (prolonged use of product prior to occurrence of injury). *But see*, Carpini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954) (W. Va. law applied); Beadles v. Servel Inc., 344 Ill. App. 133, 100 N.E.2d 405 (1951).

[6] 68 Cal. 2d 535, 439 P.2d 903, 67 Cal. Rptr. 775 (1968). *See also* Garcia v. Halsett, 3 Cal. App. 3d 319, 82 Cal Rptr. 420 (1970).

The defendant in *Pike* argued that the danger of being struck by the paydozer was a patent peril, and therefore there was no duty to install safety devices.[7] While the court recognized that the obviousness of peril was relevant to the manufacturer's defenses, especially in establishing contributory negligence, the court explained that the patency of the peril did not concern the duty issue.[8] The manufacturer's duty is to so design a product so that it is safe for the use intended and for the people who might reasonably be expected to come into contact with it. The court indicated that the manufacturer's duty of care extends to all persons within the range of the potential danger, including bystanders,[9] and not just the purchaser or prospective user of a product.

The modern rule, supported by recent decisions, seems to be that the creation of any unreasonable danger is enough to establish negligence, and whether a defect is latent or patent is material only in the jury's determination of whether the user takes an unreasonable risk when he uses the product.[10]

II. THE STRICT LIABILITY ISSUE

The present trend appears to follow the Restatement (Second) of Torts §402A[11] which establishes a basis of strict liability for de-

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[7] 2 Cal. 3d at ___, 467 P.2d at 234, 85 Cal. Rptr. at 636.

[8] *Id. See also* Montesano v. Patent Scaffolding Co., 213 F. Supp. 141 (W.D. Pa. 1962) (employer's knowledge of defective design did not insulate manufacturer from liability); *But see* Blankenship v. Morrison Mach. Co., 255 Md. 241, 257 A.2d 430 (1969) (machine designer who built and installed a machine was not liable to an injured operator for failing to equip the machine with protective guards, shields, and automatic shutoff switch where danger in operating the machine was readily apparent to the operator).

[9] *See also* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (a member of the buyer's family); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (retail buyer); Casetta v. United States Rubber Co., 260 Cal. App. 2d 792, 67 Cal. Rptr. 645 (1968) (buyer's employee); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (buyer's customer).

[10] Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product,* 71 YALE L.J. 816, 836 (1962); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5 at 1542 (1956); Brandon v. Yale & Towne Mfg. Co., 342 F.2d 519 (3rd Cir. 1965); Calkins v. Sandven, 256 Iowa 682, 129 N.W.2d 1 (1964); Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

[11] RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides in part:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

fective *design.* The general rule has been to allow recovery for defective *manufacture* either under a negligence or strict liability theory.[12] The *Pike* court found no rational distinction between defective design and manufacture since the product may be as dangerous if defectively designed as it would be if defectively manufactured.[13] For authority the court cited *Greeman v. Yuba Power Products, Inc.,*[14] which held that strict liability applied when the plaintiff was injured due to both a defective design and defective manufacture, and *Garcia v. Halsett,*[15] which held the owner of a launderette strictly liable for defective design (as a manufacturer would be) in the failure to install available safety devices on his washing machines.

In further support of the application of strict liability, the court relied on the Illinois case of *Suvada v. White Motor Co.,*[16] which imposed strict liability on the manufacturer of a brake unit found to be defectively manufactured. One year later the Illinois court, in *Wright v. Massey-Harris, Inc.,*[17] expanded the strict liability concept to include injuries which resulted from defects in design as well as defects in manufacture.

The trend toward strict liability in both defective manufacture and defective design must be limited to correspond to the design and manufacturing skill which exists in a given industry.[18] The question of a manufacturer's duty in the design of a product still remains a question of law for the courts to decide,[19] but with defective design and defective manufacture separated it should be easier to establish defective design.

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[12] Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961) (automobile); McQuaide v. Bridgeport Brass Co., 190 F. Supp. 252 (D. Conn. 1960) (insect spray); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (power saw design); Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960) (grinding wheel); Vallis v. Canada Dry Ginger Ale, Inc., 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961) (bottle).

[13] 2 Cal. 3d at ___, 467 P.2d at 236, 85 Cal. Rptr. at 636.

[14] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 967 (1962).

[15] 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970) (absence of a $2 micro-switch resulted in strict liability for the machine's owner).

[16] 32 Ill 2d 612, 210 N.E.2d 182 (1965).

[17] 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).

[18] Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968).

[19] Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), *cert. denied,* 385 U.S. 836 (1966); Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), *rev'g* 274 F. Supp. 461 (D. Minn. 1967); Schemel v. General Motors Corp., 261 F. Supp. 134 (S.D. Ind. 1966), *aff'd,* 384 F.2d 802 (7th Cir. 1967); Kahn v. Chrysler Motors Corp., 221 F. Supp. 677 (S.D. Tex. 1963.)

Product liability, especially concerning defective design, is still in the developing stage, yet recent decisions in the field of automoble design indicate an effort to fix liability on the manufacturer. Application of the intended use doctrine[20] to defective design may very well be the basis for future suits. One recent case, *Evans v. General Motors Corp.*,[21] held that a manufacturer owes a duty to design a vehicle that will be safe for the use intended, but the court explained that collisions were not a part of the use intended.[22] However, *Larsen v. General Motors Corp.*[23] appears to have challenged the traditional intended use doctrine as applied to automobiles by holding that the function of an automobile in our society is not merely to provide a means of transportation,[24] but to provide safe travel with other automobiles at speeds that carry the "possibility, probability, and potential of injury-producing impacts."[25]

III. IMPLICATIONS

While the decision in *Pike* lends strength to the advocates of increased manufacturer liability, the effect on the West Virginia courts is at best unpredictable. As recently as 1962 the West Virginia Supreme Court of Appeals upheld express warranties limiting liability.[26] In *Williams v. Chrysler Corp.*[27] the court stated, "[t]he rule seems to be well settled in this jurisdiction that a party to a valid contract may in advance limit its liability so long as one of the parties thereto is not a common carrier or where the negligent act which in futuro exempted did not amount to willful, wanton, or gross misconduct."[28] The *Williams* case, however, was decided on a tort theory rather than on a warranty theory of liability.

Federal cases applying West Virginia law seem to have expanded the manufacturer's liability considerably; it is impossible to

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[20] When a manufacturer designs and manufactures a piece of equipment, negligence may be predicated upon a failure to design the product to be safe for the use intended. Lovejoy v. Minneapolis-Moline Power Implement Co., 248 Minn. 319, 79 N.W.2d 688 (1956).

[21] 359 F.2d 822, 825 (7th Cir. 1966), *cert. denied,* 385 U.S. 836 (1966).

[22] *Id.* at 825.

[23] 274 F. Supp. 461 (D. Minn. 1967), *rev'd,* 391 F.2d 495 (8th Cir. 1968).

[24] *See also* Friend v. General Motors Corp., 118 Ga. App. 763, 165 S.E.2d 734 (1969); Mickle v. Blackman, 252 S.C. 202, 166 S.E.2d 173 (1969).

[25] Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968).

[26] Payne v. Valley Motor Sales, 146 W. Va. 1063, 124 S.E.2d 622 (1962). The court in *Nettles v. Imperial Distributors, Inc.,* 152 W. Va. 9, 159 S.E.2d 206 (1968) cited *Payne* with approval, but also pointed out that the Uniform Commercial Code might affect existing case law.

[27] 148 W. Va. 655, 137 S.E. 2d 225 (1964).

[28] *Id.* at 665, 137 S.E.2d at 231.

estimate whether the state court would interpret West Virginia law in a like manner. In *Carpini v. Pittsburgh & Weirton Bus Co.*,[29] which is probably the closest West Virginia has come to a reported defective design case, the federal court, applying West Virginia law, found negligence in the design of the petcock of the brakes of a bus. The manufacturer, General Motors Corp., was found negligent in the design of the petcock and liability was established without resorting to a discussion of privity or warranty. In *General Motors Corp. v. Johnson*,[30] a 1943 federal case applying West Virginia law, the issue of privity was disposed of by the court's statement that "the manufacturer of a truck . . . owes a duty to the public, irrespective of contract. . . ."[31]

In *Shanklin v. Allis Chalmers Mfg. Co.*,[32] a case similar to *Wright v. Massey-Harris Inc.*[33] (an Illinois case cited in *Pike* which found the defendant strictly liable in the design of a corn-picker), the court, using an Erie educated guess, stated:

> We do not find that the Supreme Court of Appeals of West Virginia has as yet made a clear-cut definitive ruling on the question of privity requirement in the area of a non-inherently or non-imminently dangerous instrumentality. We find, however, that if this case, where negligence is the gravemen of the complaint, were presented to that Court upon the record now before us, it would adopt the modern view by holding that such a showing is not a requirement for maintenance of the action.[34]

This statement by a federal court, while not binding, may accurately reflect the law in West Virginia, since the court in *Williams* passed over the privity issue, leaving it open for further consideration.[35] As a practical matter a West Virginia practitioner might find it desirable when possible to bring suit in a federal court rather than a

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[29] 216 F.2d 404 (3d Cir. 1954).
[30] 137 F.2d 320 (4th Cir. 1943).
[31] *Id.* at 322.
[32] 254 F. Supp. 223 (S.D. W. Va. 1966).
[33] 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).
[34] Shanklin v. Allis Chalmers Mfg. Co., 254 F. Supp. 223, 231 (S.D. W. Va. 1966). Both the *Shanklin* and *Wright* cases concerned injury sustained by a farm worker on a corn picking machine due to the lack of guards on safety features. In *Wright* the Illinois court considered the corn picker an unreasonably dangerous product and imposed strict liability. In the *Shanklin* case the West Virginia court gave the plaintiff standing, but the plaintiff lost because of a finding of contributory negligence.
[35] Williams v. Chrysler Corp., 148 W. Va. 655, 137 S.E.2d 225 (1964).

state court since the privity issue seems more settled by the federal decision.

It appears that West Virginia would probably accept the doctrine of strict liability laid down by *Pike*, although a suit founded on negligence in product design might be successful on the basis of *Carpini*[36] or *Shanklin*.[37] The West Virginia Supreme Court of Appeals has yet to make a definitive ruling on the privity issue in light of *Williams* or the Uniform Commercial Code, and, until such a decision is made, the status of West Virginia law with regard to defective design or manufacture will remain unsettled.

Carl N. Frankovitch

[36] Carpini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3rd Cir. 1954).
[37] 254 F. Supp. 223 (S.D. W. Va. 1966).